REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 532 of 2004

AHMEDNASIR ABDIKADIR & CO. ADVOCATES….....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED…….DEFENDANT

R U L I N G

The defendant has moved this court by way of a Chamber Summons dated 18th November 2004, which is expressed as having been brought pursuant to the provisions of Order 6 rules 13(1) (d) and 16 of the Civil Procedure Rules. Through this application, the defendant asks the court to strike out the Plaint, and to dismiss the suit.

It is the defendant's contention that the Plaint was an abuse of the process of the court, as the Plaintiff is seeking to enforce the payment of legal fees purported to have been earned as a result of the said Plaintiff's own illegal conduct.

When faced with the application, the Plaintiff issued a Notice of Preliminary Objection. By the said Notice, the Plaintiff cited the following two issues:-

"1. **The application is premised on a fallacy that it can contest the judgement of a competent court which is final and conclusive."**

"2. **The defendant has failed to appeal or file a reference from the ruling delivered by the taxing master on which the suit herein is premised upon and the certificate of cost issued by the Taxing Master has neither been set aside nor varied or challenged."**

In the light of the Notice of the Preliminary Objection, the parties agreed that the same would be tackled first. Therefore this Ruling is in relation to the said preliminary objection.

However, before I delve into the substance of the said objection, I wish to make it clear that the matter had previously been addressed by the parties, when they appeared before my brother, the Hon. Emukule J. However before the judge delivered his Ruling on the said issues, the contents thereof became known to the parties, and therefore the court declined to read out its said decision. Subsequently, the parties decided to canvass the issues afresh.

I wish to make it abundantly clear that notwithstanding the fact that the Hon. Emukule J. had prepared his Ruling on the same matter, I have neither seen his said Ruling, nor have I been in touch with the judge.

Now, in relation to the first objection, it is the Plaintiff's contention that by virtue of Section 51(2) of the Advocates Remuneration Order, the Certificate of Taxation is final and conclusive unless the same is set aside or varied by the court.

Actually, the relevant provision is Section 51(2) of the Advocates Act, which stipulates as follows:-

"**The certificate of the taxing officer by whom a bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgement be entered for the sum certified to be due with costs."**

To my mind, there cannot be any room for argument over the meaning of that statutory provision. Indeed, after giving due consideration to the submissions of both parties, I came to the distinct conclusion that they were in agreement.

The Plaintiff submitted that the certificate of costs was final and conclusive unless it is set aside or altered by the Court. His said submission finds support in the decision by the Hon. Njagi J. in **MACHARIA NJERU ADVOCATES V. COMMUNICATIONS COMMISSION OF KENYA HCCC NO. 1029 OF 2002**, at p. 11, wherein he held as follows:-

"**Looking at the provision of S. 51(2) the words thereof are that the certificate of the taxing officer shall, unless it is set aside or altered by the court, be final as to the amount of costs covered thereby. In the instant case, there is a certificate of the taxing officer certifying that the bill of costs was taxed at Kshs. 17,748,249/=. That certificate has neither been set aside, nor has it been altered by the court. It is therefore conclusive as to the amount of the costs covered thereby. "**

In the light of that holding, the court went ahead to grant summary judgement against the defendant. In doing so, the court also held that;

"**reference of the matter to a judge does not constitute a setting aside of the certificate, nor does it amount to an alteration of the certificate."**

How so very true, as the determination of the reference could lead to either the setting aside or alteration of the certificate, on the one hand; or alternatively it could lead to the confirmation of the costs already certified by the taxing officer.

The Hon, Njagi J. later restated the fact that unless and until the certificate of costs was set aside or altered by the court, it was final and conclusive as to the amount of costs covered thereby. That restatement was made in **NYAKUNDI & COMPANY ADVOCATES V. KENYATTA NATIONAL HOSPITAL, HCCC NO. 416 of 2004**, at pages 4 to 5.

The defendant does not dispute the issue of the finality of the certificate of costs, in relation to the amount covered thereby. Indeed, counsel for the defendant did submit as follows:-

"**So whilst we accept that the defendant, not having taken steps to challenge the certificate of costs, cannot now dispute the amount awarded to the plaintiff in the taxation, it remains open to the defendant to challenge the plaintiff's right to enforce the recovery of the amount awarded in costs."**

Thus, whereas the plaintiff considers the certificate of costs to constitute a judgement, the defendant says that it does not. Citing Elliot and Phipson, "**Manual on the Law of Evidence**" (12th Edition, 1987) at page 320, the Plaintiff says:-

"**A final judgement of a competent court works as estoppel, that is to say any party or privy to such litigation, as against any other party or privy thereto, is estopped in any subsequent litigation from disputing or questioning such decisions on the merits."**

It is therefore the Plaintiff's position that if a party filed suit pursuant to a judgement, the parties to the said judgement cannot have a defence to the Plaintiff's cause of action, which was based on the judgement. The rationale for that position is explained by the Plaintiff as guided by "**the old legal principle, that a man ought not**

to be allowed litigate a second time, what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and the public."

Again, in my understanding of the defendant's submissions, it does not dispute the aforegoing legal pronouncements on estoppel. However, it holds the view that although the certificate of costs may be final on the issue of costs covered thereby, the said certificate did not constitute judgement. Therefore, the defendant believes that estoppel does not arise from the facts of this case.

"**Blacks Law Dictionary",** 8th Edition defines the word "judgement" as:-

"**a court's final determination of the rights and obligations of the parties in a case."**

Based on that definition, amongst others, the defendant submitted that a judgement must be construed as a decision which establishes certain facts as proved or not in dispute; and which states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.

The Court of Appeal held as follows, in JORETH LTD V. KIGANO & ASSOCIATES [2002] 1 E.A. 92, at 96;

"**The Taxing Officer whilst taxing a bill of costs is carrying out his functions as such only. He is an officer of the superior court appointed to tax bills of costs.**

…… **In any event, what may come after taxation of a bill of costs in the superior court can only be termed as "Certificate of Taxation." See Section 51(2) of the Advocates Act.";**

In the light of that holding, the defendant expresses the view that the certificate of costs is not a judgement.

But, on its part the plaintiff feels that the learned taxing officer did adjudicate on all the issues which were placed before her. She then rendered a decision on the items which were canvassed before her. The word "**decision**" is defined in **Black's Law Dictionary,** (7th Edition) as follows:-

"**A judicial determination after consideration of the facts and the law, esp., a ruling, order or judgement pronounced by a court when considering or disposing of a case."**

From that definition, the word "decision" clearly has a wider meaning and scope than judgement. In any event, whenever a taxing officer is called upon to tax a bill of costs, if the same is as between one party and another, the court would usually have already made a decision as to which of the parties was liable to pay costs to the other. That decision would have been made when the court was determining the issues in contention either in an application or in the whole suit. Thus, the learned taxing officer would only be determining the quantum of the costs.

Meanwhile, as between an advocate and his client, again the taxing officer would only be determining the quantum of costs payable to the advocate, if that is what he was called upon to do. I say "**if"** because by filing a bill of costs for taxation, the party filing it would thus be inviting the taxing officer to tax it. That, therefore, would be the issue for his determination. And, in arriving at the determination, the taxing officer is required to be guided by appropriate factors, such as the value of the subject matter, the complexity of the case and the importance of the matter to the parties. In effect, the role of the taxing officer is not a formal procedural exercise. It requires due diligence.

However, in my considered view, the fact that the taxing officer ultimately issues a certificate of taxation does not by itself determine whether his decision is tantamount to a judgement. Similarly, the fact that the taxing officer's responsibility is an onerous one would not necessarily imply that it was a judgement. Thirdly, the fact that an aggrieved party could file a reference to a Judge of the High Court, if he objected to the taxation, does not remove the sense of finality that Section 51(2) of the Advocates Act gives to certificate of costs. It must always be recalled that the Civil Procedure Act expressly recognises the right of appeal, in relation to judgements and decrees. Therefore although such a right exists, that does not imply that the judgement was not final.

That therefore still begs the question as to whether or not the certificate of costs which was issued by the learned taxing officer constituted a judgement. To my mind, the answer does not lie in the content thereof, for instance the detailed manner in which the matters in issue were analyed. The answer is to be found in the provisions of Section 51(2) of the Advocates Act. That section recognises the fact that if there was no dispute as to retainer, the Court may make such order in relation to the certificate of the taxing officer, including judgement for the sum certified to be due.

If that statutory provision was construed in the manner suggested by the plaintiff, to the effect that the certificate of costs constituted a judgement, the plaintiff would not have needed to institute these proceedings, in which its substantive prayer is for judgement. Therefore, I overrule the first preliminary objection. In doing so, I hold that the institution and prosecution of a suit founded on a certificate of taxation is not merely a "**procedural aspect of execution**" as suggested by the plaintiff. Indeed, the plaintiff appeared to recognise that fact, when he submitted as follows:-

"**It is unfortunate that the defendant who has failed to challenge the substantive rights of the plaintiff that accrued before another court is now challenging the procedural enforcement of the award before this court. This circus underscores the weakness in the recovery of cost mechanism which cries for an urgent amendment that allows the certificate of cost to be directly executed once no appeal or reference has been lodged."**

Perhaps, if the proposed amendment were to be effected, and the party whose bill had been taxed was empowered to execute it, the law may then declare the certificate issued by the taxing officer either to be a judgement, without more, or alternatively, the law may require it to be simply registered, in the same manner as arbitral awards or foreign judgements from countries with whom Kenya enjoys reciprocity of enforcement.

But, until the law was amended, I hold that it may open, in principle, to the defendant to challenge the plaintiff's right to have the certified costs converted into a judgement.

As regards the second objection, I hold the view that the same relates to the substance of the defendant's application. In other words, the court would first have to determine whether or not the suit was founded on the alleged illegal contract. The plaintiff submitted that it did not execute the agreement which the defendant now asserts to be illegal. On the other hand, the defendant contends that the plaintiff did execute the said agreement. Therefore, the court will first have to determine that issue.

Thereafter, the court will need to determine the effect of the said agreement, on the plaintiff's claim. Of course, I am aware that the plaintiff contends that the defendant, through its advocates, had expressly conceded before the learned taxing officer, that the plaintiff was entitled to costs. Indeed, as far as the plaintiff is concerned, the only issue before the taxing officer was in relation to quantum of the costs to which the plaintiff was entitled. It is said that there was never an issue as to whether or not the plaintiff was or was not entitled to costs.

Those submissions are doubtlessly formidable. However, I hold the considered view that the said submissions ought to be raised, not by way of a preliminary objection, but in answer to the defendant's application. Accordingly, I overrule the second objection, as well, and direct that it be used in response to the application.

Finally, I direct that the costs of the preliminary objection be in the cause. The main reason for so ordering is because, as I have already indicated, the issues raised are weighty. Although I have not upheld the second objection at this stage, I think that the issue of costs is best left to follow the final outcome of the substantive application. By so doing, if the plaintiff succeeds, it will get the costs of both the application, as well as the preliminary objection. On the other hand, if the defendant succeeded, the plaint would be struck out, the suit dismissed, and costs of the suit, the application and the preliminary objection would be awarded to the said defendant.

The application dated 18th November 2004 should now be set down for hearing on a priority basis.

Dated and Delivered at Nairobi this 25th day of November 2005.

FRED A. OCHIENG

JUDGE